RECORD AND BRIEFS

No. 16-534

IN THE
Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

GERALD P. MEYER
MICHELLE J. PARTHUM
MOLOLAMKEN LLP
300 North LaSalle St.
Chicago, Illinois 60654
(312) 450-6700

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
WILLIAM J. COOPER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondent Islamic Republic of Iran

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Section 1610(g) of the Foreign Sovereign Immunities Act provides that, for certain terrorism judgments, property of a foreign state and property of an agency or instrumentality of such a state are subject to execution "as provided in this section, regardless of" five factors associated with *Bancec*. 28 U.S.C. §1610(g)(1). The question presented is:

Whether §1610(g) establishes a freestanding exception to sovereign immunity or instead merely supersedes *Bancec*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in §1610.

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement	2
I. Statutory Framework	2
A. The Foreign Sovereign Immunities Act of 1976	2
1. The FSIA's Immunity Provisions	3
2. Substantive Liability of Juridically Distinct Entities Under *Bancec*	5
B. The Terrorism Amendments to the FSIA	6
1. The 1996 Terrorism Exceptions	6
2. The Amendments Relating to Blocked Assets	7
3. The 2008 Amendments at Issue Here	9
4. The 2012 Amendments	12
II. Proceedings Below	12
A. Proceedings in the District Court	13
B. The Court of Appeals' Decision	14
Summary of Argument	17
Argument	21
I. The Text, Structure, and History of § 1610(g) Show That It Is an Exception to *Bancec*, Not a Freestanding Immunity Exception	22
A. Section 1610(g)'s Text Is Clear	22

TABLE OF CONTENTS—Continued

Page

B. Congress's Contemporaneous Amendments to the FSIA Confirm That § 1610(g) Is Not a Free-standing Immunity Exception 27

C. Section 1610(g)'s History Confirms That Congress Merely Sought To Abrogate the *Bancec* Presumption for Terrorism Judgments 29

II. Petitioners' Contrary Arguments Lack Merit 33

A. Petitioners Offer No Plausible Construction of the Phrase "As Provided in This Section" 33

1. "As Provided in This Section" Does Not Refer to § 1610(f) 33

2. "As Provided in This Section" Does Not Refer to NDAA § 1083 35

3. "As Provided in This Section" Does Not Refer Solely to Procedural Provisions in § 1610 37

B. Petitioners Cannot Avoid the Surplusage Their Construction Creates 38

C. Construing § 1610(g) Consistent with Its Express Terms Does Not Render It Self-Defeating 41

1. The Seventh Circuit's Construction Does Not Conflict with § 1610(g)'s *Bancec* Factors 41

TABLE OF CONTENTS—Continued

Page

2. Section 1610(g) Is Not Self-Defeating Merely Because It May Not Enhance Plaintiffs' Position Under Every Provision of § 1610 42

3. The Seventh Circuit's Construction Does Not Create Superfluity Within § 1610(g) 44

III. Petitioners' Construction Disregards Tradition and International Practice 46

A. Petitioners' Construction Is a Dramatic Departure from the Traditional Restrictive Theory 47

B. Petitioners' Construction Would Put the United States at Odds with International Law 49

C. Congress's Policy Against Terrorism Cannot Justify Disregarding § 1610(g)'s Limitations 52

D. Petitioners' Interpretation Threatens Important Foreign Policy Interests 55

Conclusion 57

Statutory Appendix 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott v. *Republic of South Africa*, No. 107/92, S.T.C., July 1, 1992 (Spain), translated in 113 I.L.R. 411 (1999) 51

Alejandre v. *Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999) 43

Bank Markazi v. *Peterson*, 136 S. Ct. 1310 (2016) 26, 53

Bennett v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016) 16, 17, 33

Bolivarian Republic of Venezuela v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017) 49, 50, 56

Bruesewitz v. *Wyeth LLC*, 562 U.S. 223 (2011) 45

Colella v. *Republic of Argentina*, No. C 07-80084, 2007 WL 1545204 (N.D. Cal. May 29, 2007) 54

Comm'r v. *Clark*, 489 U.S. 726 (1989) 52

Condor & Filvem v. *Minister of Justice*, No. 329, Corte Cost., July 15, 1992 (Italy), translated in 101 I.L.R. 394 (1996) 51

Corley v. *United States*, 556 U.S. 303 (2009) 28

De Letelier v. *Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) 48

First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Flatow v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002) ..... *passim*

Iraq v. *Dumez*, Brussels Civ. Ct., Feb. 27, 1995 (Belgium), translated in 106 I.L.R. 284 (1997) 51

Jurisdictional Immunities of the State (Germany v. *Italy: Greece Intervening)*, 2012 I.C.J. Rep. 99 (Feb. 3) 51, 52, 54

Kingdom of Spain v. *Company X SA*, Tribunal Fédérale, Apr. 30, 1986 (Switzerland), translated in 82 I.L.R. 38 (1990) 54

Koehler v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009) 55

Mohamad v. *Palestinian Auth.*, 566 U.S. 449 (2012) 53

Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 52

Permanent Mission of India to the United Nations v. *City of New York*, 551 U.S. 193 (2007) 47, 49

Philippine Embassy Bank Account Case, No. 2 BvM 1/76, Bundesverfassungsgericht, Dec. 13, 1977 (Germany), translated in 65 I.L.R. 146 (1984) 51

Pub. Citizen, Inc. v. *Rubber Mfrs. Ass'n*, 533 F.3d 810 (D.C. Cir. 2008) 45

Republic of Argentina v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 56

Rodriguez v. *United States*, 480 U.S. 522 (1987) (per curiam) 52

SerVaas Inc. v. *Rafidian Bank*, [2012] UKSC 40 51

Société Sonatrach v. *Migeon*, Cour de Cassation, 1e civ., Oct. 1, 1985 (France), translated in 77 I.L.R. 525 (1988) 51

Stone v. *INS*, 514 U.S. 386 (1995) 39

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 28

Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480 (1983) 2

Walter Fuller Aircraft Sales, Inc. v. *Republic of Philippines*, 965 F.2d 1375 (5th Cir. 1992) ..... *passim*

Weinberger v. *Rossi*, 456 U.S. 25 (1982) 52

STATUTES

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 ..... *passim*

28 U.S.C. § 1602 ..... 3, 47

28 U.S.C. § 1603(a) 3

28 U.S.C. § 1603(b)(1) 3

28 U.S.C. § 1603(b)(2) 3

28 U.S.C. § 1604 3

28 U.S.C. § 1605 3

28 U.S.C. § 1605(a)(2) 3

28 U.S.C. § 1605(a)(4) 48

28 U.S.C. § 1605(a)(5) 48

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1605(a)(7) ..... *passim*
28 U.S.C. § 1605(h) 54
28 U.S.C. § 1605A ..... *passim*
28 U.S.C. § 1605A(a) 9
28 U.S.C. § 1605A(a)(2)(A)(i)(II) 36
28 U.S.C. § 1605A(a)(2)(A)(ii) 41
28 U.S.C. § 1605A(c) 9, 27, 37
28 U.S.C. § 1605A(d) 37
28 U.S.C. § 1605A(g) 9, 27, 37
28 U.S.C. § 1605A(g)(1)(A) 37
28 U.S.C. § 1605B 48
28 U.S.C. § 1609 ..... *passim*
28 U.S.C. § 1610 ..... *passim*
28 U.S.C. § 1610(a) ..... *passim*
28 U.S.C. § 1610(a)(1)-(7) 38
28 U.S.C. § 1610(a)(1) 4, 43
28 U.S.C. § 1610(a)(2) 4
28 U.S.C. § 1610(a)(3) 43
28 U.S.C. § 1610(a)(7) ..... *passim*
28 U.S.C. § 1610(b) ..... *passim*
28 U.S.C. § 1610(b)(1)-(3) 38
28 U.S.C. § 1610(b)(1) 43
28 U.S.C. § 1610(b)(2) ..... *passim*
28 U.S.C. § 1610(b)(3) ..... *passim*
28 U.S.C. § 1610(c) 24, 38, 43
28 U.S.C. § 1610(d) 25, 38, 43
28 U.S.C. § 1610(e) 25, 38
28 U.S.C. § 1610(f) ..... *passim*
28 U.S.C. § 1610(f)(1) ..... *passim*
28 U.S.C. § 1610(f)(1)(A) 8, 26
28 U.S.C. § 1610(f)(2) 34, 35, 38, 43
28 U.S.C. § 1610(f)(3) 8

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1610(g) ..... *passim*
28 U.S.C. § 1610(g)(1) ..... *passim*
28 U.S.C. § 1610(g)(1)(A)-(E) 23
28 U.S.C. § 1610(g)(3) 34
28 U.S.C. § 1611 34
§ 4, 90 Stat. at 2891 48

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 6, 7, 48
§ 221(a), 110 Stat. at 1241 6
§ 221(b), 110 Stat. at 1242 48
§ 221(b)(1), 110 Stat. at 1242 6
§ 221(b)(2), 110 Stat. at 1243 7

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998) 7, 8
§ 117(a), 112 Stat. at 2681-491 8
§ 117(d), 112 Stat. at 2681-492 8

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 8
§ 2002(f)(1)(B), 114 Stat. at 1543 8
§ 2002(f)(2), 114 Stat. at 1543 8

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 ..... *passim*
28 U.S.C. § 1610 note § 201(a) 9, 26, 48
§ 201(a), 116 Stat. at 2337 ..... 9, 12

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 ..... *passim*
§ 1083(a), 122 Stat. at 338 ..... 9, 18, 27

TABLE OF AUTHORITIES—Continued

Page(s)

§ 1083(b)(1), 122 Stat. at 341 9
§ 1083(b)(3), 122 Stat. at 341 ..... 9, 35
§ 1083(b)(3)(A), 122 Stat. at 341..... 9, 18, 27, 40
§ 1083(b)(3)(B), 122 Stat. at 341..... 10, 18, 28, 40
§ 1083(b)(3)(C), 122 Stat. at 341..... 10, 18, 28
§ 1083(b)(3)(D), 122 Stat. at 341 ..... 10, 35
§ 1083(c)(2)(A), 122 Stat. at 342..... 35
§ 1083(c)(3), 122 Stat. at 343..... 35

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214..... 7, 12, 40
§ 502(e), 126 Stat. at 1260 12
§ 502(e)(1), 126 Stat. at 1260 ..... 12, 40
§ 502(e)(1)(B), 126 Stat. at 1260..... 7
§ 502(e)(2), 126 Stat. at 1260 12

Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016)..... 48

Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016) 54

Immunity from Seizure Act, Pub. L. No. 89-259, 79 Stat. 985 (1965) 54

Foreign States Immunities Act 1985, No. 196, §§ 30, 32 (Australia)..... 51

Act on Civil Jurisdiction over Foreign States, Law No. 24 of 2009, arts. 17-18 (Japan), translated in 53 Japanese Y.B. Int'l L. 830, 835 (2010)..... 51

State Immunity Ordinance, No. 6 of 1981, § 14(2)(b) (Pakistan)..... 51

TABLE OF AUTHORITIES—Continued

Page(s)

State Immunity Act, ch. 313, § 15(2)-(4) (Singapore) 51

Foreign States Immunities Act 87 of 1981, § 14 (South Africa) 51

State Immunity Act 1978, c. 33, § 13(4) (United Kingdom) 51

TREATY PROVISIONS

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, (Dec. 2, 2004) 50, 53

Art. 19 50

Art. 21.1(d) 53

Art. 21.1(e) 53

European Convention on State Immunity, art. 26, May 16, 1972, E.T.S. No. 74 49

LEGISLATIVE MATERIALS

H.R. 865, 109th Cong. § 2 (2005) 11, 29

S. 1257, 109th Cong. § 2 (2005) 11, 29, 41

H.R. Rep. No. 94-1487 (1976) 3, 4, 47, 49

H.R. Rep. No. 110-477 (2007) 11, 30

151 Cong. Rec. 12,869 (June 16, 2005) 11, 30, 31

154 Cong. Rec. 500 (Jan. 22, 2008) 11, 30, 31, 43

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. (June 2, 1976) 50

TABLE OF AUTHORITIES—Continued

Page(s)

Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Courts & Administrative Practice of the S. Comm. on the Judiciary, 103d Cong. (June 21, 1994) 55, 56

Press Release, *Lautenberg-Specter Bill To Provide Justice for Victims of State-Sponsored Terrorism Signed into Law* (Jan. 29, 2008), available at https://votesmart.org/public-statement/315541 ..... 31, 32

Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* (Aug. 8, 2008)..... 32

EXECUTIVE MATERIALS

63 Fed. Reg. 59,201 (Oct. 21, 1998)..... 8, 34

65 Fed. Reg. 66,483 (Oct. 28, 2000)..... 8, 34

Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep't of State Bull. 984 (May 19, 1952)..... 2

U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442 (9th Cir. filed Oct. 23, 2015)..... 56

U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582 (2d Cir. filed Nov. 4, 2011)..... 56

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182 (9th Cir. filed July 3, 2014) 56

OTHER AUTHORITIES

M. Douglass Bellis, Federal Judicial Center, *Statutory Structure and Legislative Drafting Conventions* (2008) 34

Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement* (1991) 50

International Law Association, *Draft Convention on State Immunity*, 22 I.L.M. 287 (1983) 51

Oriental Institute, *Photographic Archives: Persepolis and Ancient Iran*, https://oi.uchicago.edu/persepolis-ancient-iran 13

Report of the International Law Commission on the Work of Its Forty-Third Session, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) 50

Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* (2012) 54

IN THE

Supreme Court of the United States

NO. 16-534

JENNY RUBIN, *et al.*,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

PRELIMINARY STATEMENT

Petitioners brought this enforcement action to seize ancient Persian artifacts that Iran loaned to the University of Chicago for academic study almost a century ago. That seizure would require a dramatic departure from traditional immunity principles. Nothing in 28 U.S.C. § 1610(g) countenances that extreme result.

Congress enacted § 1610(g) to accomplish a more modest goal: abrogating for terrorism cases the presumption of separate status that sovereign instrumentalities ordinarily enjoy under this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). Section 1610(g)

provides that assets are subject to execution on certain terrorism judgments "as provided in this section, regardless of" certain factors associated with *Bancec*. 28 U.S.C. § 1610(g)(1). Plaintiffs thus may execute against assets "regardless of" *Bancec*'s presumption of separate status. But the assets are subject to execution only "as provided in this section," *i.e.*, under *existing* immunity rules. The statute does not say that plaintiffs may execute "regardless of" sovereign immunity principles generally.

Petitioners' contrary construction would render parts of the statute completely superfluous. It finds no support in the legislative history. And it flouts this Court's repeated admonitions that statutes should be construed in a manner consistent with international law.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act of 1976

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity for a state's "strictly commercial acts." *Id.* at 486-487. As the State Department explained, the "practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep't of State Bull. 984, 985 (May 19, 1952).

Two decades later, Congress codified that restrictive theory in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as

amended at 28 U.S.C. §§ 1602 *et seq.*). The Act explains that, "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. The FSIA sought to "codify th[at] so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. No. 94-1487, at 7 (1976).

1. *The FSIA's Immunity Provisions*

The FSIA governs the immunity of "foreign state[s]," a term that includes the sovereign itself as well as any "agency or instrumentality" thereof. 28 U.S.C. § 1603(a). An agency or instrumentality is an entity established as "a separate legal person, corporate or otherwise," that is an organ or political subdivision of the state or a majority state-owned enterprise. *Id.* § 1603(b)(1)-(2). Typical examples include a "state trading corporation," a "mining enterprise," or a "central bank." H.R. Rep. No. 94-1487, at 15-16.

The FSIA addresses both (1) the immunity of *foreign sovereigns from suit*; and (2) the immunity of *sovereign property from attachment and execution*. With respect to immunity from suit—commonly known as "jurisdictional" immunity—the FSIA preserves the general rule that "a foreign state [including an agency or instrumentality] shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The Act then lists carefully circumscribed exceptions. *Id.* § 1605. For example, under the "commercial activity" exception, a foreign sovereign is not immune from actions "based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Before the FSIA's enactment, sovereign property "enjoy[ed] absolute immunity from execution," even under the restrictive theory. H.R. Rep. No. 94-1487, at 8. Plaintiffs who obtained judgments against foreign states thus had to rely on sovereign grace for their satisfaction. Section 1609 of the FSIA retains the general rule that "property in the United States of a foreign state [including an agency or instrumentality] shall be immune from attachment arrest and execution." 28 U.S.C. § 1609.

The FSIA, however, provides limited exceptions to that immunity in § 1610. Section 1610(a) lists exceptions that apply both to property of the sovereign itself and to property of its agencies and instrumentalities. Under that provision, "property in the United States of a foreign state [including property of an agency or instrumentality] used for a commercial activity in the United States" is not immune from execution if one of certain additional conditions is met. 28 U.S.C. § 1610(a). Under § 1610(a)(1), for example, property of a foreign state used for commercial activity in the United States is not immune from execution if the foreign state has waived its immunity. *Id.* § 1610(a)(1). Under § 1610(a)(2), property of a foreign state used for commercial activity in the United States is not immune if the property "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2).

Section 1610(b) provides additional exceptions for property of a foreign state's agencies or instrumentalities. Such property is not immune from execution if the agency or instrumentality is "engaged in commercial activity in the United States" and one of certain further conditions is met. 28 U.S.C. § 1610(b). Thus, consistent

with the restrictive theory, both § 1610(a) and § 1610(b) require commercial activity.

2. *Substantive Liability of Juridically Distinct Entities Under* Bancec

As a general matter, the FSIA does not address the circumstances in which a sovereign's agencies or instrumentalities may be held liable for judgments against the sovereign itself. This Court resolved that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *Bancec* explained that the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620. Instead, such matters are governed by substantive international and federal common law. *Id.* at 623. Applying that law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

Bancec identified two narrow exceptions to that presumption of separate status. First, a court may pierce an instrumentality's corporate veil where the entity is "so extensively controlled by its owner that a relationship of principal and agent is created." 462 U.S. at 629. Second, a court may disregard an instrumentality's separate status where the sovereign has abused the corporate form to "'work fraud or injustice.'" *Ibid.*

In the wake of *Bancec*, courts developed five "factors" to determine whether the presumption of separate status had been overcome. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Consistent with

Bancec's first exception—and its focus on whether the sovereign exercised pervasive dominion and control over the instrumentality—those factors included such considerations as "the level of economic control by the government" and "the degree to which government officials manage the entity or otherwise have a hand in its daily affairs." *Walter Fuller*, 965 F.2d at 1380 n.7.

B. The Terrorism Amendments to the FSIA

Over the last two decades, Congress has repeatedly amended the FSIA to address terrorism claims.

1. *The 1996 Terrorism Exceptions*

Congress first amended the FSIA to permit terrorism claims against foreign sovereigns in 1996. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241. That statute added a new exception to jurisdictional immunity that was originally codified at 28 U.S.C. § 1605(a)(7). The exception denied immunity for claims arising from certain acts of terrorism or material support for terrorism if the United States had designated the foreign sovereign a state sponsor of terrorism. *Ibid.*

The 1996 amendments also added exceptions to execution immunity for judgments obtained under § 1605(a)(7). First, Congress expanded the circumstances in which a foreign state's "property in the United States * * * used for a commercial activity in the United States" would lose immunity. 28 U.S.C. § 1610(a). Specifically, § 1610(a)(7) denied immunity to such commercial property when "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based." Pub. L. No. 104-132, § 221(b)(1),

110 Stat. at 1243 (codified as amended at 28 U.S.C. §1610(a)(7)).

Congress similarly expanded the circumstances in which the U.S. property of "an agency or instrumentality of a foreign state engaged in commercial activity in the United States" would lose immunity. 28 U.S.C. §1610(b). Congress amended §1610(b)(2) to deny immunity to such property when the judgment related to a claim under §1605(a)(7), whether or not the property was involved in the act on which the claim was based. See Pub. L. No. 104-132, §221(b)(2), 110 Stat. at 1243 (amending 28 U.S.C. §1610(b)(2)). (Years later, Congress moved that exception to its own provision in §1610(b)(3). See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, §502(e)(1)(B), 126 Stat. 1214, 1260.)

Congress thus expanded the range of property that was not immune from execution for plaintiffs with terrorism judgments under §1605(a)(7). But the new provisions still required commercial activity: They applied only to property used by the sovereign for commercial activity in the United States, or property of an agency or instrumentality engaged in commercial activity in the United States.

2. *The Amendments Relating to Blocked Assets*

In 1998, Congress added another exception for execution of terrorism judgments—this time for assets the Executive Branch had "blocked" or otherwise regulated under economic sanctions statutes. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, §117, 112 Stat. 2681, 2681-491 (1998). Codified as §1610(f)(1), that exception provided:

> Notwithstanding any other provision of law, * * * any property with respect to which financial trans-

> actions are prohibited or regulated pursuant to [various sanctions statutes] shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune under section 1605(a)(7).

Id. § 117(a), 112 Stat. at 2681-491 (codified as amended at 28 U.S.C. § 1610(f)(1)(A)).

Congress authorized the President to waive subsection (f)(1) "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. at 2681-492. The President immediately did so, finding that it "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998).

Two years later, Congress repealed the provision authorizing that waiver. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1543. In light of Executive Branch opposition, however, Congress added a new waiver provision before the bill's enactment. See *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)). The President promptly issued another waiver. 65 Fed. Reg. 66,483 (Oct. 28, 2000).

In 2002, Congress revisited the topic of blocked assets in the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337. Section 201(a) of that statute provided:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) * * *, the

> blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Id. § 201(a), 116 Stat. at 2337 (reproduced as amended at 28 U.S.C. § 1610 note § 201(a)).

3. *The 2008 Amendments at Issue Here*

In 2008, Congress enacted the statute at issue here: Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, 338 (reproduced App., *infra*, 1a-12a). That statute made several relevant changes.

First, in NDAA § 1083(a), Congress created a new exception to jurisdictional immunity for terrorism claims. Pub. L. No. 110-181, § 1083(a), 122 Stat. at 338. Codified at 28 U.S.C. § 1605A, that provision replaced the original exception at § 1605(a)(7). *Id.* § 1083(a), (b)(1), 122 Stat. at 338-341. Like former § 1605(a)(7), the new provision abrogates jurisdictional immunity for terrorism claims against designated state sponsors of terrorism. 28 U.S.C. § 1605A(a). But it also expands the available remedies by, among other things, creating an express federal cause of action, authorizing punitive damages, and providing for liens of *lis pendens*. *Id.* § 1605A(c), (g).

Second, in NDAA § 1083(b)(3), Congress revised various exceptions to execution immunity to make them available for § 1605A judgments. Congress updated the commercial activity exception for terrorism judgments in § 1610(a)(7), making it applicable to judgments under new § 1605A rather than old § 1605(a)(7). See Pub. L. No. 110-

181, § 1083(b)(3)(A), 122 Stat. at 341. Congress made essentially the same change to the commercial activity exception for instrumentality assets in § 1610(b)(2) (now § 1610(b)(3)). See *id.* § 1083(b)(3)(B), 122 Stat. at 341. And it made a similar change to the exception for blocked or regulated assets in § 1610(f). See *id.* § 1083(b)(3)(C), 122 Stat. at 341.

Finally, in NDAA § 1083(b)(3)(D), Congress enacted the provision at issue in this case—28 U.S.C. § 1610(g). See Pub. L. No. 110-181, § 1083(b)(3)(D), 122 Stat. at 341. That provision states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, *including* property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section, regardless of*—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g)(1) (emphasis added). The five factors in paragraphs (A) through (E) are the same five "*Bancec* factors" that courts had used to determine whether a plaintiff had overcome *Bancec*'s presumption of separate juridical status. See, *e.g.*, *Flatow*, 308 F.3d at 1071 n.9.

Section 1610(g) originated from a bill proposed in 2005. See S. 1257, 109th Cong. § 2 (2005); H.R. 865, 109th Cong. § 2 (2005). Introducing that legislation, Senator Specter explained that § 1610(g) was designed to "eliminat[e] many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism * * * by changing the legal standard of the Bancec doctrine from day to day managerial control to those under the beneficial ownership of the state." 151 Cong. Rec. 12,869 (June 16, 2005).

Senator Lautenberg gave a similar explanation in 2008. "The misapplication of the 'Bancec doctrine,'" he stated, "has in the past erroneously protected the assets of terrorist states from attachment or collection." 154 Cong. Rec. 500 (Jan. 22, 2008). One court, for example, had held that plaintiffs "could not attach [an] asset because they could not show that [the sovereign] exercised day-to-day managerial control" over the instrumentality. *Ibid.* Section 1610(g) would "remedy this issue by allowing attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." *Ibid.*; see also H.R. Rep. No. 110-477, at 1001 (2007) (explaining that § 1610(g) would "subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution").

Neither Senator Specter, nor Senator Lautenberg, nor anyone else expressed dissatisfaction with the commercial activity requirements for overcoming execution immunity. Nor did anyone identify a purpose for § 1610(g)

beyond abrogating *Bancec*'s presumption of separate status and replacing *Bancec*'s focus on day-to-day managerial control with a "simple" or "beneficial" ownership standard.

4. *The 2012 Amendments*

Four years later, Congress again adjusted the provisions governing execution immunity for terrorism judgments. See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, §502(e), 126 Stat. 1214, 1260.

First, Congress amended the commercial activity exceptions in §1610(a)(7) and §1610(b)(2) (now §1610(b)(3)). Having updated those provisions in 2008 to refer to §1605A rather than §1605(a)(7), Congress again amended them to refer to *both* §1605A *and* §1605(a)(7). See Pub. L. No. 112-158, §502(e)(1), 126 Stat. at 1260. As a result, plaintiffs can now invoke those commercial activity exceptions whether they have new terrorism judgments under §1605A or old ones under §1605(a)(7).

Congress also amended TRIA. That statute had previously made blocked assets available only to plaintiffs holding judgments under old §1605(a)(7). Pub. L. No. 107-297, §201(a), 116 Stat. at 2337. Congress amended the statute so plaintiffs holding §1605A judgments could invoke it too. See Pub. L. No. 112-158, §502(e)(2), 126 Stat. at 1260.

II. PROCEEDINGS BELOW

Petitioners are American citizens injured in a 1997 terrorist attack in Jerusalem. Pet. App. 5a. They filed suit against the Islamic Republic of Iran, alleging that it had provided support to Hamas, the organization that carried out the attack. *Ibid.* Iran declined to appear and, in 2003, petitioners obtained a default judgment. *Id.* at 6a.

A. Proceedings in the District Court

1. Petitioners commenced this action in an effort to satisfy their default judgment by executing against four collections of ancient Persian artifacts held by the University of Chicago's Oriental Institute and the Field Museum of Natural History. Pet. App. 6a.

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments "containing some of the oldest writings in the world." Pet. App. 4a-5a. The Oriental Institute uncovered those artifacts when it excavated the ancient city of Persepolis with Iran's permission in the 1930s. C.A. R. 657 at 4. The tablets and fragments date from around 500 B.C., and many are inscribed with cuneiform Elamite, a rare and lost language that is difficult to translate. *Ibid.*; C.A. R. 648 Ex. 4; see Oriental Institute, *Photographic Archives: Persepolis and Ancient Iran*, https://oi.uchicago.edu/persepolis-ancient-iran. In 1937, Iran loaned the Persepolis Collection to the Oriental Institute for research, translation, and cataloguing. Pet. App. 4a-5a.

The Chogha Mish Collection consists of clay seal impressions that Iran excavated from the ancient Chogha Mish settlement in the 1960s and then loaned to the Oriental Institute for academic study. Pet. App. 5a. The Herzfeld Collection includes approximately 1200 prehistoric artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archaeologist. *Ibid.* Finally, the Oriental Institute Collection contains Persian artifacts donated by Iran and various other donors. *Id.* at 5a, 47a n.6.[1]

---

[1] The Chogha Mish artifacts were returned to Iran following the district court's decision, and Iran has disclaimed any ownership of the

2. The district court granted summary judgment to Iran and the museums, holding that the antiquities were immune from execution. Pet. App. 43a-71a. The court first held that §1610(a)'s commercial activity exception did not apply. *Id.* at 50a-57a. Petitioners argued that the *museums* had engaged in commercial activity by "studying and displaying the artifacts." *Id.* at 51a. But even assuming that conduct could be deemed "commercial," the court held, §1610(a) "requires the commercial activity to be conducted by the sovereign." *Id.* at 57a.

The district court also rejected petitioners' argument that, even absent commercial activity, §1610(g) abrogated the antiquities' immunity from execution. Pet. App. 57a-62a. "Section 1610(g)," the court held, "is not a separate basis of attachment." *Id.* at 61a. Rather, "the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered." *Id.* at 62a. Because §1610(g) was not an independent exception to immunity, the provision "d[id] not subject the collections in question to attachment and execution." *Ibid.*[2]

B. The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1a-38a.

1. The court of appeals agreed with the district court that petitioners could not execute against the antiquities under §1610(a)'s commercial activity exception. Pet.

Herzfeld and Oriental Institute Collections. Pet. App. 8a-10a. Consequently, only the Persepolis Collection remains at issue. *Id.* at 10a.

[2] The district court also ruled that petitioners could not execute against the antiquities under TRIA, because they were not "blocked assets." Pet. App. 62a-70a. The court of appeals agreed, *id.* at 35a-38a, and petitioners did not seek review of that ruling.

App. 14a-21a. The court was "skeptical" that the museums' "academic study qualifies as a commercial use." *Id.* at 16a. But even if it did, "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity," and "[n]othing in the record suggests that Iran itself used the Persepolis Collection for a commercial activity." *Id.* at 20a. Although petitioners sought this Court's review of that ruling, the Court excluded the issue in its order granting certiorari. 137 S. Ct. 2326 (2017).

2. The court of appeals likewise agreed with the district court that petitioners could not use §1610(g) to avoid the commercial activity requirement. Pet. App. 21a-35a. The court rejected petitioners' contention that §1610(g) is "a freestanding exception to execution immunity for terrorism-related judgments." *Id.* at 22a-28a. "Section 1610(g)," the court held, "is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the *Bancec* rule for terrorism-related judgments." *Id.* at 35a.

The court of appeals began by noting that §1610(g) undeniably abrogated *Bancec*'s rule that "foreign sovereigns and their instrumentalities are treated separately for execution purposes." Pet. App. 21a-22a. Courts had identified five factors to consider when deciding whether *Bancec*'s presumption of separate status had been overcome. *Id.* at 23a-24a. Section 1610(g) made those five factors "irrelevant" by declaring that plaintiffs with §1605A judgments could "execute on the property of the foreign state *and* the property of its agency or instrumentality '*as provided in this section*' but '*regardless of*' the five factors listed in subsections (A)-(E)." *Id.* at 25a (quoting 28 U.S.C. §1610(g)(1)). "[T]he five factors made irrelevant by subsection (g) mirror almost exactly the

factors developed by the lower courts under the *Bancec* doctrine." *Ibid.*

The court of appeals rejected petitioners' argument that "subsection (g) goes further and establishes a free-standing 'terrorism' exception to execution immunity." Pet. App. 26a. Section 1610(g), the court observed, states that property of a sovereign and its instrumentalities is subject to execution only "'*as provided in this section.*'" *Id.* at 27a. "The highlighted phrase makes very little sense—indeed, is entirely superfluous—if subsection (g) is itself a freestanding exception to execution immunity." *Ibid.* Petitioners' interpretation thus "violate[d] the 'cardinal principle' that a statute should be interpreted to avoid superfluity." *Ibid.*

Petitioners' interpretation also "create[d] superfluities in other parts of the statute." Pet. App. 27a. Sections 1610(a)(7) and (b)(3) already deny immunity from execution of terrorism judgments where certain commercial conduct is shown. *Ibid.* (citing 28 U.S.C. §1610(a)(7), (b)(3)). If §1610(g) "pave[d] a dedicated lane for all execution actions by victims of state-sponsored terrorism" without requiring any commercial conduct, §1610(a)(7) and (b)(3) would "serve no purpose at all." *Id.* at 27a-28a. That result was particularly improbable because Congress amended §1610(a)(7) and (b)(3) at the same time it enacted §1610(g) in 2008—amendments that would have been pointless if petitioners' construction of §1610(g) were correct. *Id.* at 28a n.5.

3. The court of appeals noted that the Ninth Circuit had reached a contrary result in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016). Pet. App. 32a-33a. The Ninth Circuit "purported to explain away the 'as provided in this section' language in subsection (g) by interpreting it to apply only to §1610(f)." *Id.* at 33a.

The Seventh Circuit rejected that construction as a "highly strained interpretation." *Ibid.* First, "it implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" *Ibid.*

"Second, and importantly, § 1610(f) *never became operative*"—the President issued a blanket waiver the day the provision was enacted. Pet. App. 33a. As a result, § 1610(f) "does not allow *any* form of execution." *Id.* at 34a. "It therefore makes no sense to say, as the *Bennett* majority does, that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

The court thus concluded that "Section 1610(g) is not itself an exception to execution immunity." Pet. App. 35a. Instead, it merely "abrogates the *Bancec* rule for terrorism-related judgments." *Ibid.* "Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state's property *and* the property of its agency or instrumentality—without regard to the *Bancec* presumption of separateness—but they must do so 'as provided in this section.'" *Ibid.* "That is, they must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b)." *Ibid.*

SUMMARY OF ARGUMENT

Congress enacted § 1610(g) to permit certain terrorism plaintiffs to execute against sovereign and instrumentality assets without regard to the customary presumption of separate status this Court recognized in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). Con-

gress did not eliminate the rules of sovereign immunity for terrorism judgments altogether.

I.A. While foreign state assets are generally immune from execution, § 1610 sets forth narrow exceptions to that immunity. Section 1610(g) then provides that, for certain terrorism judgments, "the property of a foreign state * * * and the property of an agency or instrumentality of such a state, including property that * * * is an interest held directly or indirectly in a separate juridical entity," is subject to execution "*as provided in this section, regardless of*" five factors associated with *Bancec*. 28 U.S.C. § 1610(g)(1) (emphasis added). That provision is clear: Assets are subject to execution "regardless of" *Bancec*'s presumption of separate status. But they are subject to execution only "as provided in this section"—*i.e.*, consistent with *existing* immunity rules in § 1610. Section 1610(g)(1) does not say that property is "not immune" or that it is subject to execution "regardless of" the FSIA's immunity principles generally. Indeed, it does not mention immunity at all.

B. Petitioners' claim that § 1610(g) is a freestanding immunity exception ignores the provision's statutory context. Congress enacted § 1610(g) in § 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, 338. That same statute also created the new exception to jurisdictional immunity for terrorism claims in § 1605A, and it amended the FSIA's existing exceptions to execution immunity to make them available for § 1605A judgments. *Id.* § 1083(a), (b)(3)(A)-(C), 122 Stat. at 338-341. Petitioners' construction of § 1610(g) would render the amendments to the execution immunity provisions superfluous. Those exceptions each impose specific requirements—for example, § 1610(a)(7)'s requirement that property be used

for a commercial activity. There would be no reason for Congress to adjust those existing immunity exceptions to cover § 1605A judgments if § 1610(g) permitted plaintiffs to execute § 1605A judgments against *all* property with no further requirements at all.

C. Petitioners' construction finds no support in the legislative history. That history shows that Congress enacted § 1610(g) to eliminate *Bancec*'s focus on domination and control as the standard for piercing the corporate veil, replacing it with a test of "simple" or "beneficial" ownership. There is no evidence that Congress also intended to abrogate the longstanding commercial activity requirement for overcoming execution immunity.

II.A. Petitioners' contrary arguments are meritless. Petitioners offer no plausible explanation for § 1610(g)'s inclusion of the phrase "as provided in this section." They barely defend the Ninth Circuit's theory that the phrase refers to subsection (f)—a construction that implausibly reads "this section" to refer to a particular *subsection* and renders § 1610(g) wholly inoperative. Petitioners' new theory that "this section" refers to NDAA § 1083 attributes remarkable drafting incompetence to Congress and still fails to give any meaningful effect to the phrase "as provided in this section." Finally, amici's theory that the phrase refers only to *procedural* provisions fares no better. Section 1610(g) draws no distinction between substance and procedure—it refers broadly to § 1610, a section that focuses overwhelmingly on *substantive* immunity standards.

B. Petitioners likewise have no response to the surplusage their construction would create. They assert that § 1610(a)(7) and (b)(3) would not be superfluous *as currently codified* because they apply to both old § 1605(a)(7) judgments and new § 1605A judgments, while § 1610(g)

applies only to the latter. But that misses the point. The *2008 amendments* were superfluous under petitioners' construction because Congress would have had no reason to *amend* the FSIA's exceptions to execution immunity to refer to §1605A if plaintiffs with §1605A judgments could invoke a blanket exception under §1610(g).

C. Section 1610(g)'s *Bancec* factors are not irreconcilable with the commercial activity requirement; the two tests address different issues. The claim that §1610(g) may not enhance plaintiffs' opportunities for execution under each and every subsection of §1610 is beside the point. And the claim that the Seventh Circuit's interpretation renders certain language in §1610(g) superfluous is incorrect. Deleting that language would render the statute incomprehensible. In any event, §1610(g)'s phrasing was a reasonable way for Congress to convey its intent: that sovereign property and instrumentality property should be equally subject to execution without regard to the *Bancec* presumption that would ordinarily require treating them differently.

III.A-B. Petitioners' construction is a dramatic departure from the traditional restrictive theory of immunity. It would put the United States in violation of international law. This Court should insist on a clear indication of Congress's intent before countenancing such a result.

C-D. The facts of this case demonstrate the extreme consequences of petitioners' construction. Cultural artifacts are the opposite of commercial property and traditionally were never thought subject to execution. As the Executive Branch has warned, expansive constructions of immunity exceptions threaten United States interests by encouraging reciprocal actions by foreign governments.

ARGUMENT

Petitioners seek to satisfy their default judgment by seizing ancient Persian artifacts loaned to an American museum almost a century ago for academic study. That sort of cultural property—a nation's historic patrimony—has long been immune from execution. Instead, execution has historically been limited to commercial property and commercial entities. Nothing in § 1610(g) contemplates the dramatic departure from well-accepted immunity principles that petitioners now propose.

Section 1610(g)'s text, structure, and history all make clear that the provision addresses an entirely different issue. For decades, this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), precluded plaintiffs from seizing instrumentality assets to satisfy judgments against a sovereign except in narrow circumstances. Section 1610(g) modifies that rule of substantive law for certain terrorism cases by providing that property of the sovereign *and* its instrumentalities is subject to execution "as provided in this section, regardless of" five factors associated with *Bancec*. 28 U.S.C. § 1610(g)(1). Petitioners seek to rewrite that provision so that it renders property subject to execution not only "regardless of" *Bancec* but "regardless of" immunity principles generally.

That is not what § 1610(g) says. The provision says nothing about immunity at all—it addresses only the *Bancec* rule. To the extent there is any doubt, it is eliminated by the provision's context, its legislative history, and this Court's repeated admonitions against construing statutes in a way that violates international law.

I. THE TEXT, STRUCTURE, AND HISTORY OF § 1610(g) SHOW THAT IT IS AN EXCEPTION TO *BANCEC*, NOT A FREESTANDING IMMUNITY EXCEPTION

Section 1610(g) is not a freestanding immunity exception. Rather, it accomplishes a more modest goal: abrogating *Bancec*'s presumption of separate status for certain terrorism judgments.

A. Section 1610(g)'s Text Is Clear

Section 1609 establishes the general rule that assets of a sovereign and its instrumentalities are immune from execution. 28 U.S.C. § 1609. Section 1610 sets forth narrow exceptions to that execution immunity—for example, where property is used for a commercial activity and other conditions are met. *Id.* § 1610. Section 1610(g) then provides that, where a terrorism judgment is entered against a foreign state under § 1605A, the property of that state *and* its agencies and instrumentalities is subject to execution "as provided in this section, regardless of" the five *Bancec* factors. *Id.* § 1610(g)(1).

There is only one plausible interpretation of that text: Where an asset is subject to execution "as provided in this section"—that is, pursuant to the immunity exceptions in § 1610—a plaintiff may execute against the asset "regardless of" the *Bancec* factors that would otherwise limit execution to property of the sovereign itself. Section 1610(g) does not say, as petitioners would have it, that plaintiffs can seize assets "regardless of" immunity principles generally. Congress exempted certain plaintiffs from meeting the traditional criteria for piercing an instrumentality's corporate veil. But those plaintiffs still must prove that the property they seek to seize falls within one of § 1610's exceptions to immunity.

1. Congress enacted §1610(g) against the backdrop of this Court's decision in *Bancec*. The question in that case was whether a Cuban state-owned bank could be held liable for claims against the Cuban government. 462 U.S. at 613. Invoking substantive principles of international and domestic law, this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. The Court identified only two narrow exceptions: where an entity is "so extensively controlled by its owner that a relationship of principal and agent is created," and where the sovereign abuses the corporate form to "'work fraud or injustice.'" *Id.* at 629. Lower courts distilled that holding into five "factors" that determine whether the presumption of separate status has been overcome. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992).

Viewed against that backdrop, §1610(g)'s obvious purpose was to abrogate *Bancec*'s presumption of separate status for terrorism judgments. Section 1610(g) provides that, where a plaintiff obtains a terrorism judgment against a foreign state under §1605A, "the property of [the] foreign state * * * *and* the property of an agency or instrumentality of [the] state, including property that * * * is an interest held directly or indirectly in a separate juridical entity," is subject to execution "*as provided in this section, regardless of*" five factors. 28 U.S.C. §1610(g)(1) (emphasis added). "[T]he five factors made irrelevant by subsection (g) mirror almost exactly the factors developed by the lower courts under the *Bancec* doctrine." Pet. App. 25a; compare 28 U.S.C. §1610(g)(1)(A)-(E) with *Flatow*, 308 F.3d at 1071 n.9. The meaning of Congress's

directive that § 1605A judgments may be executed against sovereign *and* instrumentality assets "regardless of" those five factors is obvious: *Bancec*'s presumption of separate status does not apply.

2. Nothing in § 1610(g) suggests that Congress went further and abrogated the immunity of all sovereign and instrumentality assets from execution on terrorism judgments. Section 1610(g) provides that assets are subject to execution only "as provided in this section"—*i.e.*, under the existing immunity rules in § 1610. 28 U.S.C. § 1610(g)(1). And it states that assets are subject to execution "regardless of" the five *Bancec* factors—not regardless of § 1610's requirements generally. *Ibid.*

Section 1610 lists a series of exceptions to execution immunity, each with specific requirements. Section 1610(a), for example, sets forth rules for overcoming the immunity of a foreign state's assets, in each case requiring that they be "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(g)'s statement that assets are subject to execution "as provided in this section" thus means execution under those traditional criteria. Similarly, § 1610(c) requires that a sovereign be afforded a reasonable opportunity to pay a judgment before the court authorizes execution. *Id.* § 1610(c). Section 1610(g) incorporates that requirement too.

In each case, the plaintiff can execute against assets of the state and its juridically distinct instrumentalities "regardless of" *Bancec*'s presumption of separate status. 28 U.S.C. § 1610(g)(1). But the assets must still be subject to execution "as provided in" § 1610. *Ibid.* Had Congress intended § 1610(g) to be a freestanding immunity exception, it would have provided that property is subject to execution "regardless of" the Act's immunity provisions. Instead it did the opposite, providing that property is

subject to execution "regardless of" the *Bancec* factors but only "as provided in" § 1610 itself.

If a state college created a scholarship program that set forth certain academic eligibility criteria, and then provided that all graduate students were eligible for a scholarship "as provided in this section, regardless of" their state of residence, no one would suggest that the proviso meant that graduate students do not have to comply with the academic criteria at all. Rather, the plain meaning would be that graduate students must comply with the same academic requirements as everyone else. The proviso merely singles out another potentially relevant factor—the state of residence—and excludes it from consideration. Section 1610(g) functions the same way.

3. Where Congress modified immunity elsewhere in the FSIA, it used language clearly indicating that intent. Section 1609 states the general rule that foreign state property "shall be immune." 28 U.S.C. § 1609. And § 1610's exceptions identify certain types of property that "shall not be immune." See *id.* § 1610(a) (property "shall not be immune * * * from execution" if used for commercial activity and other requirements met); *id.* § 1610(b) (property of instrumentality engaged in commercial activity "shall not be immune * * * from execution" if other requirements met); *id.* § 1610(d) (certain property "shall not be immune from attachment prior to the entry of judgment"); *id.* § 1610(e) (vessels "shall not be immune from * * * execution"). If Congress had intended § 1610(g)(1) to be a freestanding *immunity* exception, it would have used similarly clear language. But the provi-

sion does not mention immunity at all.[3]

Congress had good reason not to use the term "immunity" in § 1610(g)(1). The provision does not address immunity at all. It addresses a distinct question: whether courts must respect the separate juridical status of instrumentalities. As *Bancec* explained, the presumption of separate status is not a rule of immunity, but a principle of *substantive law* that prohibits holding one entity liable for another's debts. 462 U.S. at 620 (FSIA "not intended to affect the substantive law determining the liability of a foreign state or instrumentality"). Because Congress's goal in § 1610(g) was to abrogate *Bancec* for certain cases, it made perfect sense to enact a provision that altered only that *substantive law* principle—while still requiring plaintiffs to comply with the *immunity* rules "as provided in" § 1610.

If Congress had intended § 1610(g) to be an across-the-board immunity exception, it would have said so. It could have stated that, for plaintiffs with § 1605A judgments, property of the sovereign and its instrumentalities "shall not be immune." Or it could have declared that such property is "not immune" *and* subject to execution "regardless of" *Bancec*. Congress did the opposite. It provided that property is subject to execution only "as provided in this section"—subjecting the property to the immunity provisions in § 1610—while limiting the "re-

---

[3] In some instances, Congress provided for execution "[n]otwithstanding any other provision of law"—language that has been construed to permit execution notwithstanding another provision that grants immunity. See 28 U.S.C. § 1610(f)(1)(A); 28 U.S.C. § 1610 note § 201(a). But § 1610(g) contains no such language either. See *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016) ("Section 1610(g) does not take precedence over 'any other provision of law,' as the TRIA does.").

gardless of" clause to the five *Bancec* factors. 28 U.S.C. § 1610(g)(1).

B. Congress's Contemporaneous Amendments to the FSIA Confirm That § 1610(g) Is Not a Free-standing Immunity Exception

At the same time Congress enacted § 1610(g), it made several other changes to the FSIA. Construing § 1610(g) to be a freestanding immunity exception would render several of those amendments wholly superfluous.

Congress enacted § 1610(g) as part of § 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, 338. That legislation did several things. First, it created a new exception to *jurisdictional* immunity for terrorism claims codified at 28 U.S.C. § 1605A, replacing the prior exception at § 1605(a)(7). See *id.* § 1083(a), 122 Stat. at 338. Section 1605A expanded the remedies for terrorism plaintiffs, providing an express federal cause of action, authorizing punitive damages, and providing for liens of *lis pendens*. 28 U.S.C. § 1605A(c), (g).

At the same time, Congress systematically revised the existing exceptions to execution immunity to make them available to plaintiffs with judgments under new § 1605A. For example, § 1610(a)(7) had previously denied immunity where plaintiffs holding terrorism judgments under § 1605(a)(7) sought to execute against property used for a commercial activity in the United States. Congress amended that provision by deleting the reference to § 1605(a)(7) and replacing it with a reference to new § 1605A. Pub. L. No. 110-181, § 1083(b)(3)(A), 122 Stat. at 341. As a result, § 1610(a)(7) applied to plaintiffs with terrorism judgments under new § 1605A—but *only* if the property was used for a commercial activity in the United

States. Congress made similar changes to other parts of §1610 as well. See *id.* §1083(b)(3)(B)-(C), 122 Stat. at 341.

Petitioners' construction of §1610(g) renders those changes wholly superfluous. Petitioners contend that §1610(g) is an across-the-board immunity exception that permits execution of §1605A judgments against sovereign and instrumentality assets with no further requirements. If that were correct, however, there would have been no reason for Congress to tinker with existing immunity exceptions to make them available to plaintiffs with §1605A judgments.

Each of those pre-existing exceptions has specific requirements, such as commercial use of the property in the United States. 28 U.S.C. §1610(a)(7). No plaintiff with a §1605A judgment would bother to invoke those other provisions, and undertake the burden of proving those additional requirements, if §1610(g) abrogated immunity regardless. What plaintiff would expend the effort to prove that a sovereign used property for a commercial activity under §1610(a)(7) if §1610(g) abrogated immunity with no further showing at all? Petitioners' construction thus renders multiple provisions of NDAA §1083 pointless and inexplicable.

"[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant * * * ." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (quotation marks omitted); see also *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought * * * to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). Petitioners' construction flouts that principle. This Court ought not adopt a con-

struction that requires it to dismiss numerous careful revisions in the NDAA as pointless.

Viewing NDAA §1083 as a whole, Congress's plan is not hard to discern. Congress created a new exception to jurisdictional immunity; it adjusted the existing exceptions to execution immunity to be compatible with judgments entered under that new provision; and it suspended *Bancec*'s substantive-law presumption of separate status for those same judgments. Petitioners' construction of §1610(g) wrenches that provision from its statutory context and ascribes it a meaning that neither its text nor its broader context can sustain.

C. Section 1610(g)'s History Confirms That Congress Merely Sought To Abrogate the *Bancec* Presumption for Terrorism Judgments

To the extent any doubt remains—and none does—§1610(g)'s history erases it. While petitioners assert that Congress enacted §1610(g) to overcome the "formidable impediment[]" of the commercial activity requirement, Pet. Br. 58-61, they cite not one passage of legislative history mentioning that goal. Section 1610(g)'s history in fact shows that Congress enacted the provision for a different purpose: abrogating *Bancec*'s presumption of separate status.

1. The legislation that eventually became §1610(g) was proposed by Senators Specter and Lautenberg in 2005. S. 1257, 109th Cong. §2 (2005); see also H.R. 865, 109th Cong. §2 (2005) (House version). Senator Specter explained that the provision was designed to "eliminat[e] many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism * * * by *changing the legal standard of the Bancec doctrine* from day to day managerial control to those under the beneficial ownership of the

state." 151 Cong. Rec. 12,869 (June 16, 2005) (emphasis added). In *Bancec*, he explained, "the U.S. Supreme Court created a presumption against a party that seeks to satisfy an outstanding judgment against a foreign government." *Ibid.* The bill would "ease the burden on the families of victims of terrorism by permitting them to attach the hidden assets of terrorist states." *Ibid.* Nowhere did Senator Specter mention the commercial activity requirement or any specific objective other than abrogating *Bancec*.

Three years later, Senator Lautenberg persuaded the Senate to attach the bill to defense appropriations legislation. See 154 Cong. Rec. 500 (Jan. 22, 2008) (Sen. Lautenberg) (claiming authorship). He too explained § 1610(g) solely in terms of abrogating *Bancec*:

> The *misapplication of the "Bancec doctrine"* * * * has in the past erroneously protected the assets of terrorist states from attachment or collection. For example, in Flatow v. Bank Saderat Iran, the Flatow family attempted to attach an asset owned by Iran through the Bank Saderat Iran. Although Iran owned the Bank Saderat Iran, the court, relying on *the State Department's application of the Bancec doctrine*, held that the Flatows could not attach the asset because they could not show that Iran exercised day-to-day managerial control over Bank Saderat Iran. My provision will remedy this issue by allowing attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a "simple ownership" test.

Ibid. (emphasis added); see also H.R. Rep. No. 110-477, at 1001 (2007) (provision would apply to "any property interest in which the foreign state enjoys a beneficial ownership"). Nowhere did Senator Lautenberg mention

the commercial activity requirement or any intent to modify immunity rules.

Petitioners invoke the portion of that legislative history that mentions a "simple ownership" or "beneficial ownership" test. Pet. Br. 57. But they misunderstand that language. Under *Bancec*, courts could disregard an instrumentality's separate status if the entity was "so extensively controlled by its owner that a relationship of principal and agent is created." 462 U.S. at 629. One of the five *Bancec* factors was thus "the degree to which government officials manage the entity or otherwise have a hand in its daily affairs." *Walter Fuller*, 965 F.2d at 1380 n.7. The legislative history that petitioners invoke merely explains that, in enacting § 1610(g), Congress was replacing that focus on domination and control with a "simple ownership" or "beneficial ownership" test. In Senator Specter's words, the legislation "chang[ed] the legal standard of the Bancec doctrine from *day to day managerial control* to *[assets] under the beneficial ownership of the state*." 151 Cong. Rec. 12,869 (June 16, 2005) (emphasis added); see also 154 Cong. Rec. 500 (Jan. 22, 2008) (Sen. Lautenberg) (replacing focus on "day-to-day managerial control" with "'simple ownership' test"). Nowhere did anyone suggest that § 1610(g) replaced the requirements for overcoming *immunity*—such as commercial activity—with a "simple ownership" test.

2. Tellingly, the day after the President signed the NDAA into law, Senator Lautenberg issued a press release that directly refutes petitioners' interpretation. See Press Release, *Lautenberg-Specter Bill To Provide Justice for Victims of State-Sponsored Terrorism Signed into Law* (Jan. 29, 2008), available at https://votesmart.org/public-statement/315541. The press release declared that "[t]he new law will * * * allow the seizure of hidden

commercial assets belonging to terrorist states so victims of terrorism can be justly compensated" and would "allow[] these victims to seize hidden *commercial* assets for compensation if they win judgments in court." *Ibid.* (emphasis added). The legislation's author and sponsor thus understood that § 1610(g) did not eliminate the customary commercial activity requirements for overcoming immunity from execution.

The Congressional Research Service reached the same conclusion just months later. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* (Aug. 8, 2008). Its report notes that the statute "address[es] which property of foreign States is subject to levy in execution of terrorism judgments." *Id.* at 54. The report immediately adds: "In order for property to be attached, *it must also fall under an exception to sovereign immunity or otherwise fail to qualify for immunity.*" *Id.* at 54 n.208 (emphasis added). The report then discusses the commercial activity limitations of § 1610(a)(7) and (b)(2) (now (b)(3)) in detail. *Ibid.* Petitioners and their amici cite that report seven times, but they overlook the key passage addressing the precise issue at hand.

If Congress had intended § 1610(g) to be a freestanding immunity exception that eliminated the commercial activity requirement, there would be some trace of that intent in the legislative history. There is none. The legislation's author and sponsors were clear: Section 1610(g) was designed to abrogate *Bancec* for certain terrorism judgments—and nothing more.

II. Petitioners' Contrary Arguments Lack Merit

Petitioners' contrary arguments defy §1610(g)'s text and broader context.

A. Petitioners Offer No Plausible Construction of the Phrase "As Provided in This Section"

Petitioners struggle to avoid reading the phrase "as provided in this section" out of the statute entirely. The plain meaning of that phrase is obvious. Section 1610 sets forth a series of exceptions to execution immunity. By providing that sovereign and instrumentality assets are subject to execution on §1605A judgments "as provided in this section, regardless of" *Bancec*, Congress made clear that §1610(g) abrogates only *Bancec*'s presumption of separate status, while still requiring plaintiffs to comply with the immunity rules set forth in §1610. Petitioners hypothesize various alternative meanings for that phrase. But their proposals are implausible.

1. *"As Provided in This Section" Does Not Refer to §1610(f)*

Petitioners half-heartedly reprise the theory the Ninth Circuit adopted in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), cert. pending, No. 16-334. Pet. Br. 44-45. The Ninth Circuit held that, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in §1610(f)." 825 F.3d at 959. As the Seventh Circuit recognized, that is a "highly strained interpretation" that "makes no sense." Pet. App. 33a-34a.

As an initial matter, the Ninth Circuit's interpretation "implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" Pet. App. 33a. That cannot be right. "[F]rom the earliest days of the Republic, the

text of a law * * * has been divided into sections"—the "most fundamental division of federal law." M. Douglass Bellis, Federal Judicial Center, *Statutory Structure and Legislative Drafting Conventions* 8 (2008). "A section in turn is normally divided into subsections * * * designated by lowercase letters: '(a),' '(b),' etc." *Ibid.* Thus, § 1609, § 1610, § 1611, and so on are "sections," while their subdivisions (§ 1610(a), § 1610(b), etc.) are "subsections." The phrase "as provided in this section" appears in a particular *section* of the U.S. Code—§ 1610. Thus, "*this* section" can only refer to § 1610, not *sub*section (f).[4]

Petitioners' construction is particularly implausible given that § 1610(f)(1) "*never became operative.*" Pet. App. 33a. Immediately after Congress enacted the provision, the President issued a blanket waiver. See 63 Fed. Reg. 59,201 (Oct. 21, 1998); 65 Fed. Reg. 66,483 (Oct. 28, 2000). It is fanciful to suppose that Congress used the phrase "this section" to refer *exclusively* to a subsection of § 1610 that never went into effect. Moreover, "subsection (f), being inoperative from the start, does not allow *any* form of execution." Pet. App. 34a. "It therefore makes no sense to say * * * that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

Petitioners' amici respond that one paragraph within § 1610(f)—§ 1610(f)(2)—remains operative despite the waiver. See FDD Br. 4, 8. But paragraph (f)(2) contains no execution mechanism. It merely encourages federal

---

[4] Congress was clearly aware of that terminology: It used the term "subsection" elsewhere in § 1610(g) when referring to a specific subsection within § 1610. See 28 U.S.C. § 1610(g)(3) ("Nothing in this *sub*section * * * ." (emphasis added)).

agencies to "assist [plaintiffs] * * * in identifying, locating, and executing against" assets. 28 U.S.C. § 1610(f)(2). Execution "as provided in" paragraph (f)(2) thus would still mean no execution at all.

2. *"As Provided in This Section" Does Not Refer to NDAA § 1083*

Petitioners now invent a new theory—that "'this section' refers to the entirety of section 1083 of the NDAA of 2008," the public law that contained § 1610(g). Pet. Br. 45. That implausible theory would require this Court to impute to Congress a remarkable degree of drafting incompetence.

Congress did not use the phrase "as provided in this section" in some uncodified provision of the NDAA. The phrase appears in language that Congress directed to be *inserted into the U.S. Code*. "Section 1610 of title 28, United States Code," Congress declared, "is amended * * * by adding at the end the following: * * *." Pub. L. No. 110-181, § 1083(b)(3), (3)(D), 122 Stat. at 341. Congress thus plainly intended that the phrase "as provided in this section" would appear in a particular section of the U.S. Code, and that the phrase "this section" would therefore refer to that Code section—*i.e.*, to § 1610. Congress would not have used the phrase "this section" in the *codified* text of § 1610(g) to refer to a section of an *uncodified* public law.

Another provision of the same statute makes that clear. In § 1605A, Congress repeatedly used the phrase "this section" to refer to the Code section, while expressly referencing the NDAA when it wanted to cite uncodified provisions of the public law:

> CLAIM HEARD.—The court shall hear a claim under *this section* if * * * in the case of an action that is

> refiled under *this section* by reason of *section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008* or is filed under *this section* by reason of *section 1083(c)(3) of that Act*, the foreign state was designated as a state sponsor of terrorism * * * .

28 U.S.C. §1605A(a)(2)(A)(i)(II) (emphasis added). Congress clearly appreciated that, when inserting text into the U.S. Code, "this section" meant the Code section. When Congress wanted to refer to an uncodified section of the public law, it did so expressly.

Petitioners point out that an earlier draft of the bill used the phrase "this section" in proposed §1610(g) to refer to text in §1605A. Pet. Br. 45-46. But they admit that Congress changed the reference from "this section" to "section 1605A" later in the drafting process. *Id.* at 46. "[O]ne could claim that the inconsistency was detected and corrected" in the final version. *Ibid.* Yes, one could—and that claim would be correct. The fact that Congress perceived the need to "correct[ ]" the error refutes rather than supports petitioners' interpretation.[5]

Construing "this section" to refer to NDAA §1083, moreover, does not overcome the fundamental flaw in petitioners' construction: It still leaves the phrase "as provided in this section" with no coherent purpose or meaning. Petitioners speculate that Congress might have been referring to the portions of §1605A that authorize claims for "punitive damages, claims for property loss,

---

[5] Petitioners note that various *uncodified* provisions of NDAA §1083 use the phrase "this section" to refer to §1083. Pet. Br. 47. That proves nothing. When Congress uses the phrase "this section" in *un*codified text, the term necessarily refers to the public law. But when Congress uses the phrase in text designed to be inserted verbatim into the U.S. Code, the term refers to the Code section.

and various insurance-related claims." Pet. Br. 48 (citing 28 U.S.C. § 1605A(c), (d)). But those provisions have nothing to do with execution; they define the types of damages available in an action under § 1605A. It makes no sense—grammatically or legally—to say that assets are subject to execution "as provided in" a provision that defines the types of damages a plaintiff can seek rather than the requirements for execution.[6]

3. *"As Provided in This Section" Does Not Refer Solely to Procedural Provisions in § 1610*

Petitioners' amici offer yet a third interpretation. They claim that "as provided in this section" refers to the *procedures* in § 1610, while excluding the substantive requirements for overcoming immunity. See Former Officials Br. 23-25; FDD Br. 3-4. That interpretation fares no better.

For one thing, § 1610(g) declares that certain assets are subject to execution "as provided in this section"—not that they are subject to execution "according to the *procedures* in this section," or "in the *manner* provided by this section." 28 U.S.C. § 1610(g). Section 1610(g)'s language draws no distinction between procedural and substantive requirements for overcoming immunity. Moreover, § 1610(g) states only that assets are subject to execution "regardless of" the *Bancec* factors. Consequently, the only barrier § 1610(g) eliminates is *Bancec*.

---

[6] Petitioners also claim support from § 1605A(g)'s provision for a lien of *lis pendens*. As petitioners note, an earlier draft of § 1605A(g) did not limit the lien to property subject to execution under § 1610—which they take as an indication that § 1610(g) must be similarly broad. Pet. Br. 48-49. But Congress *revised* § 1605A(g) prior to enactment so that it *was* limited to property subject to execution under § 1610. See *ibid.*; 28 U.S.C. § 1605A(g)(1)(A). That drafting history likewise refutes petitioners' position.

Assets are still subject to execution only "as provided in" § 1610.

Indeed, most of § 1610's provisions concern substantive immunity standards, not procedure. See 28 U.S.C. § 1610(a)(1)-(7), (b)(1)-(3), (d), (e), (f)(1). The only even arguable exceptions are § 1610(c) and (f)(2). It is wholly implausible that Congress would use the broad phrase "this section" to refer exclusively to those two isolated provisions *within* § 1610—particularly since the provisions are a singularly awkward fit for amici's construction.[7]

Finally, amici's theory cannot overcome the other defects in their interpretation. It would still require the Court to dismiss Congress's careful changes to other provisions of § 1610 in 2008 as pointless surplusage. And it finds no support in the legislative history. The theory thus fails for all the same reasons as petitioners'.

B. Petitioners Cannot Avoid the Surplusage Their Construction Creates

Petitioners' effort to avoid creating surplusage likewise fails. As explained above, when Congress enacted § 1610(g), it simultaneously adjusted the scope of various immunity exceptions—each of which imposes specific requirements—to make them compatible with newly enacted § 1605A. Those amendments would have been pointless if § 1610(g) were a freestanding immunity ex-

---

[7] Section 1610(c) requires the court to give a sovereign a reasonable time to pay the judgment before allowing execution, but it applies only to "execution referred to in subsections (a) and (b)." 28 U.S.C. § 1610(c). Amici never adequately reconcile that limitation with their theory that "this section" in § 1610(g) *excludes* subsections (a) and (b) but *includes* subsection (c). Section 1610(f)(2), for its part, is not a *procedure for execution* at all—it merely encourages federal agencies to "assist" plaintiffs in locating and executing against assets. 28 U.S.C. § 1610(f)(2); see pp. 34-35, *supra*.

ception that allowed plaintiffs to execute §1605A judgments against *all* property without meeting the specific requirements those other provisions impose. See pp. 27-29, *supra*.

Petitioners urge that their construction does not render §1610(a)(7) and (b)(3) superfluous because those provisions apply to both old terrorism judgments under §1605(a)(7) and new ones under §1605A. Pet. Br. 41. Section 1610(g), by contrast, applies only to new §1605A judgments. *Ibid.* Petitioners speculate that Congress might have preserved §1610(a)(7)'s commercial activity exception for plaintiffs with claims against Iraq, who might not have been able to invoke §1605A or §1610(g). *Id.* at 41-44. That argument fails three times over.

First, whether or not petitioners' construction renders superfluous 28 U.S.C. §1610(a)(7) and (b)(3) *as currently codified*, it clearly renders superfluous the *amendments* that NDAA §1083 made to those provisions in 2008. Those amendments made the commercial activity exceptions in §1610(a)(7) and (b)(3) (then (b)(2)) available to plaintiffs with judgments under new §1605A. There is no rational reason why Congress would have gone to the trouble of making those provisions available to plaintiffs with §1605A judgments—requiring those plaintiffs to prove commercial activity—if, *in the very same statute*, it was also adding a new provision abrogating the immunity of *all* property for those same §1605A judgments *without regard* to commercial activity. "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995). Petitioners' construction violates that canon egregiously—regardless of what §1610(a)(7) and (b)(3) currently provide.

Second, when Congress amended § 1610(a)(7) and (b)(3) (then (b)(2)) in 2008, it *deleted* the references to old § 1605(a)(7) from those provisions entirely, replacing them with references to § 1605A. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. at 341. It was not until 2012 that Congress added back the references to § 1605(a)(7) so that the immunity exceptions applied to both old judgments and new ones. See Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260 (2012). Thus, in 2008 and for four years thereafter, plaintiffs with old § 1605(a)(7) judgments *could not invoke* the exceptions in § 1610(a)(7) and (b)(3). Petitioners' theory that Congress kept those exceptions on the books for the benefit of plaintiffs with old § 1605(a)(7) judgments thus makes no sense.

Finally, even focusing on § 1610(a)(7) and (b)(3) as they exist today, petitioners' construction still violates the canon against superfluity. Those provisions specifically address judgments *under § 1605A*. See 28 U.S.C. § 1610(a)(7) (applicable to judgments "under section 1605A or section 1605(a)(7)"); *id.* § 1610(b)(3) (similar). Even if § 1610(a)(7) and (b)(3) remain relevant for plaintiffs with old § 1605(a)(7) judgments, that does not explain why the provisions refer to § 1605A as well. In petitioners' view, § 1610(g) abrogates immunity for § 1605A judgments, period. If that were correct, no plaintiffs with § 1605A judgments would ever bother trying to overcome immunity by showing commercial activity under § 1610(a)(7) or (b)(3); those plaintiffs could always rely on § 1610(g) instead. Petitioners' construction thus renders § 1610(a)(7) and (b)(3) superfluous to the extent they refer to § 1605A.[8]

---

[8] Petitioners' amici assert that § 1610(a)(7)'s reference to § 1605A has independent force because § 1610(a)(7) applies whenever a plaintiff relies on the *immunity exception* in § 1605A, whereas § 1610(g) applies only where a plaintiff relies on the *cause of action* in § 1605A.

C. Construing § 1610(g) Consistent with Its Express Terms Does Not Render It Self-Defeating

Construing § 1610(g) in accordance with its plain language does not render it self-defeating. Section 1610(g) has precisely the effect Congress intended—abrogating *Bancec* for certain terrorism cases while requiring plaintiffs to comply with the rest of the statute.

1. *The Seventh Circuit's Construction Does Not Conflict with § 1610(g)'s* Bancec *Factors*

Petitioners argue that § 1610(g)'s exclusion of the five *Bancec* factors from consideration "cannot be reconciled with a requirement that the property being attached must be used * * * for commercial activities." Pet. Br. 32. Many of the excluded factors, they urge, concern commercial activity—such as "the degree to which officials of the foreign state manage property or otherwise control its daily affairs." *Id.* at 32-33.

Petitioners conflate two distinct questions. The *Bancec* factors are used to assess whether the sovereign exercises such dominion and control over an instrumentality that courts should pierce the corporate veil, holding

---

Bennett Plaintiffs Br. 23-25. But amici nowhere explain why § 1610(g)'s reference to judgments "entered under section 1605A" refers only to the cause of action and not the immunity exception. Cf. S. 1257, 109th Cong. § 2 (2005) (referring to "judgment[s] * * * entered under subsection (a)(7) or (h) of section 1605," the immunity exception and cause of action respectively). In any event, amici identify no material difference between the scope of the immunity exception and the scope of the cause of action, and thus no reason to believe Congress focused on any such distinction. Amici claim the difference matters to plaintiffs who are not U.S. nationals, service members, or government employees or contractors because they cannot invoke § 1605A's cause of action. Bennett Plaintiffs Br. 24. But those plaintiffs cannot invoke the immunity exception either. See 28 U.S.C. § 1605A(a)(2)(A)(ii).

the instrumentality substantively liable for a judgment against the sovereign. See *Bancec*, 462 U.S. at 629. The court thus examines factors such as "the level of economic control by the *government* [as opposed to the instrumentality]" and "the degree to which *government* officials [as opposed to instrumentality officials] manage the entity or otherwise have a hand in its daily affairs." *Walter Fuller*, 965 F.2d at 1380 n.7 (emphasis added). If the sovereign's *control* is sufficiently pervasive, courts will disregard the instrumentality's separate status.

Section 1610(a)(7) focuses on a different issue: whether the sovereign (or instrumentality) "use[s] [the property] for a commercial activity in the United States." 28 U.S.C. § 1610(a). Whether property is being put to commercial or non-commercial use is a completely separate issue from whether the sovereign is meddling in the instrumentality's day-to-day affairs. Neither test has any bearing on the other. Petitioners' claim of inconsistency is contrived.

2. *Section 1610(g) Is Not Self-Defeating Merely Because It May Not Enhance Plaintiffs' Position Under Every Provision of § 1610*

Petitioners insist that § 1610(g) must be a freestanding immunity exception because the contrary construction would limit its utility in executing against instrumentality property under § 1610(b). Pet. Br. 33-36. Sections 1610(b)(2) and (3) abrogate the immunity of agency or instrumentality assets where "the judgment relates to a *claim for which the agency or instrumentality* is not immune." 28 U.S.C. § 1610(b)(2), (3) (emphasis added). If the judgment relates to a claim against the instrumentality itself, petitioners urge, there would be no need to overcome the instrumentality's separate status to execute against its *own assets*. Pet. Br. 34-35. Consequently,

the Seventh Circuit's construction of §1610(g) generally will not enhance a plaintiff's remedies under §1610(b)(2) or (3). *Ibid.*

That observation, however, hardly justifies ignoring §1610(g)'s text. Section 1610(g)'s reference to "this section" means §1610, even if plaintiffs will not invoke every subsection of §1610 with equal frequency. Petitioners do not dispute that, even if §1610(g) merely abrogates *Bancec*, *many* provisions of §1610 remain relevant to plaintiffs invoking it. Under §1610(a)(7), for example, property used by the sovereign (or its instrumentality) for a commercial activity in the United States is not immune from execution of a §1605A judgment. Plaintiffs with §1605A judgments against sovereigns thus may well be able to rely on §1610(g) to execute against any instrumentality property that is not immune because it is being put to commercial use. Cf. *Alejandre* v. *Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1282-1289 (11th Cir. 1999) (denying attachment under §1610(a)(7) due to instrumentality's separate status); *Flatow*, 308 F.3d at 1069-1074 (similar); 154 Cong. Rec. 500 (Jan. 22, 2008) (Sen. Lautenberg) (discussing case). Other paragraphs of §1610(a), such as (a)(1) or (a)(3), might also apply (even if they would typically be subsumed within (a)(7)). Section 1610(c) would apply to limit the timing of execution. Section 1610(d) might authorize prejudgment attachment, as petitioners' amici acknowledge. Former Officials Br. 24. And §1610(f)(2)'s assistance provision would apply as well.

Even within §1610(b), paragraph (b)(1)'s waiver exception may apply. Consequently, where an instrumentality engages in commercial activity and has waived its property's immunity, a plaintiff with a §1605A judgment against the sovereign may be able to invoke §1610(b)(1)

to overcome the immunity of the instrumentality's property while relying on §1610(g) to render the instrumentality substantively liable for the judgment against the sovereign. Petitioners concede as much. Pet. Br. 36 (arguing inapplicability of subsection (b) only "absent a waiver of immunity"). As petitioners' amici acknowledge, such waivers may often be relevant in terrorism cases because the U.S. government may insist on them in the course of claims settlement. See Former Officials Br. 24.

Consequently, how §1610(g) interacts with isolated provisions like §1610(b)(2) or (3) is neither here nor there. The Seventh Circuit's interpretation does not render §1610(g) inoperative or practically so. Nor does that interpretation leave so many provisions of §1610 irrelevant that Congress would not plausibly have referred to property subject to execution "as provided in this section." Section 1610(g) interacts with most provisions of §1610. That it may not interact with *all* of them proves nothing.

3. *The Seventh Circuit's Construction Does Not Create Superfluity Within §1610(g)*

Finally, petitioners assert that, if §1610(g) merely abrogated *Bancec*, part of §1610(g) itself would be superfluous. Pet. Br. 37-38. Section 1610(g) states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, *including* property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section, regardless of* [the *Bancec* factors].

28 U.S.C. §1610(g)(1) (emphasis added). Petitioners urge that, if §1610(g) merely abrogated *Bancec*, the provisions' initial clauses—such as the reference to property of a foreign state—would be unnecessary: *Bancec* is irrelevant where a plaintiff seeks to execute against such property to satisfy a judgment against the sovereign. Pet. Br. 37-38.

That argument does not demonstrate superfluity. Simply deleting the words "property of a foreign state" would render the statute incomprehensible. So too would deleting the entire phrase "property of a foreign state against which a judgment is entered under section 1605A." The reference to "foreign state" does not merely identify a category of property. It also identifies the entity "against which a judgment is entered under section 1605A"—the "judgment" the statute later refers to when it states that property is subject to execution "upon *that judgment*." 28 U.S.C. §1610(g)(1) (emphasis added). Similarly, removing the reference to "an agency or instrumentality" would render the "including" clause incoherent. Deleting any text would thus make nonsense of the statute.

Petitioners' claim thus is not so much that certain words would be rendered superfluous. It is that one could completely rewrite the statute to express the thought differently or in fewer words. That is insufficient. See *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 236 (2011) (canon against superfluity does not apply merely because "a passage * * * could have been more terse"); *Pub. Citizen, Inc.* v. *Rubber Mfrs. Ass'n*, 533 F.3d 810, 816-817 (D.C. Cir. 2008) (canon inapplicable if it would require "adding words that are not in the statute").

Congress's locution, moreover, makes good sense. Congress enacted §1610(g) to ensure that property that

is not immune under § 1610 would be available to satisfy a terrorism judgment, whether the property is owned by the state itself or by an agency or instrumentality. In other words, property of an agency or instrumentality should be treated the same way as property of the sovereign itself, including where the agency or instrumentality would otherwise be treated as juridically distinct. Section 1610(g)'s phrasing is a reasonable way to convey that concept. By fully describing those categories, Congress identified all the kinds of assets available to satisfy a § 1605A judgment where the requirements of § 1610 are met. Congress exhaustively described the categories so that all of them were accounted for.

In any event, § 1610(g) still provides that assets are subject to execution only "as provided in this section, regardless of" *Bancec*. Petitioners still can offer no plausible construction of the phrase "as provided in this section." Petitioners still seek to rewrite a statute that says that assets are subject to execution "regardless of" *Bancec* to say that assets are subject to execution "regardless of" sovereign immunity generally. Petitioners still cannot explain the surplusage their construction creates elsewhere in NDAA § 1083. Finally, petitioners still cannot explain away what the legislative history shows: that Congress enacted § 1610(g) to abrogate the *Bancec* presumption for certain terrorism judgments, not to create a new blanket exception to immunity.

III. PETITIONERS' CONSTRUCTION DISREGARDS TRADITION AND INTERNATIONAL PRACTICE

Petitioners' inability to reconcile their interpretation with § 1610(g)'s text, structure, and history is reason enough to reject it. But their construction also represents a dramatic departure from traditional domestic and international immunity principles. The specific applica-

tion of the statute here—to seize cultural artifacts on loan to a museum for academic study—underscores the extreme nature of petitioners' position. Given the potential impact on international relations, such an unprecedented departure from settled principles should be countenanced only where Congress makes its intent clear. Congress nowhere indicated such an intent here.

A. Petitioners' Construction Is a Dramatic Departure from the Traditional Restrictive Theory

The restrictive theory of immunity, and its distinction between commercial and non-commercial activity, has been a cornerstone of the FSIA for decades. Congress enacted the FSIA to "codify the so-called 'restrictive' principle of sovereign immunity," under which immunity is "'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." H.R. Rep. No. 94-1487, at 7 (1976); see also *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199 (2007) (adoption of restrictive theory a "well-recognized * * * purpose[ ] of the FSIA"). Congress incorporated that distinction between commercial and non-commercial activity into the statute's findings and declaration of purpose: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their *commercial* activities are concerned, and their *commercial* property may be levied upon for the satisfaction of judgments rendered against them in connection with their *commercial* activities." 28 U.S.C. § 1602 (emphasis added).

Congress has been especially vigilant of that distinction in the context of execution. The FSIA's execution exceptions are "narrower" than its jurisdictional exceptions. *Republic of Argentina* v. *NML Capital, Ltd.*, 134

S. Ct. 2250, 2256 (2014). Thus, while the FSIA's original *jurisdictional* exceptions extended to certain tort claims and other matters, all of the *execution* exceptions were restricted from the outset to property "used for a *commercial activity* in the United States" or property of an agency or instrumentality "engaged in *commercial activity* in the United States." Pub. L. No. 94-583, § 4, 90 Stat. 2891, 2892-2893, 2896 (1976) (codified as amended at 28 U.S.C. §§ 1605(a)(4)-(5), 1610(a)-(b)) (emphasis added). Those limitations applied even where the underlying judgment stemmed from heinous tortious conduct. See, *e.g.*, *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 795-799 (2d Cir. 1984) (denying execution despite claims of "state-sponsored terrorism").

Congress has respected that limitation ever since. When Congress created a new jurisdictional exception for terrorism claims in 1996, it enacted corresponding exceptions to execution immunity—but limited the exceptions to property used for a *commercial activity* or instrumentalities engaged in a *commercial activity*. See Pub. L. No. 104-132, § 221(b), 110 Stat. 1214, 1243 (1996) (codified as amended at 28 U.S.C. § 1610(a)(7), (b)(3)). Petitioners point to the recent Justice Against Sponsors of Terrorism Act as evidence that Congress subordinated those traditional limitations to other goals. Pet. Br. 50. But that statute concerns jurisdictional immunity, not execution. See Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016) (codified at 28 U.S.C. § 1605B). The only context where Congress has permitted execution of terrorism judgments absent commercial activity is property blocked or regulated under economic sanctions statutes. See 28 U.S.C. § 1610(f)(1); 28 U.S.C. § 1610 note § 201(a). Those are assets the Executive Branch has already decided to

restrain—a mechanism of governmental control and accountability that is absent in private litigation.

Construing § 1610(g) as a blanket immunity exception with virtually no restriction on the type of property that may be seized would be a dramatic departure from that tradition. This Court has insisted on clear evidence before concluding that Congress intended to depart from traditional immunity principles. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (rejecting broad construction of immunity exception absent evidence "suggest[ing] Congress intended a radical departure from the[ ] basic principles" of "the 'restrictive' theory of sovereign immunity"). There is no such evidence here.

B. Petitioners' Construction Would Put the United States at Odds with International Law

Petitioners' interpretation would also thwart the FSIA's commitment to international law. A "central premise" of the FSIA is that immunity decisions should be made "on the basis of a statutory regime which incorporates standards recognized under international law." H.R. Rep. No. 94-1487, at 14; see *Helmerich*, 137 S. Ct. at 1319. This Court regularly looks to international standards when interpreting the statute. See, *e.g.*, *Permanent Mission of India*, 551 U.S. at 200. Petitioners' construction creates an irreconcilable conflict with those standards.

International conventions uniformly limit execution to commercial assets. The European Convention on State Immunity permits execution only against property used for "an industrial or commercial activity"—and even then, only if the state has adopted certain optional treaty provisions. European Convention on State Immunity, art. 26, May 16, 1972, E.T.S. No. 74. That Convention is

particularly relevant because it was discussed at length in the FSIA's legislative history. See, *e.g.*, *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 36-50 (June 2, 1976).

The United Nations International Law Commission took the same approach after studying international practices for nearly 15 years. See *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, 12, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2). The Commission's Draft Articles on Jurisdictional Immunities of States and Their Property immunize sovereign property from execution unless the state consents to execution, the state earmarks the property for satisfaction of the claim, or "the property is specifically in use or intended for use by the State for other than government non-commercial purposes." *Id.* at 56 art. 18(1).

The U.N. General Assembly formally approved that standard in the U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 2, 2004). Absent consent or earmarking to satisfy a claim, the Convention permits execution only if "the property is specifically in use or intended for use by the State for other than government non-commercial purposes." *Id.* art. 19. This Court has looked to that Convention as evidence of the "basic principles of international law" the FSIA reflects. See *Helmerich*, 137 S. Ct. at 1320.[9]

---

[9] See also Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement* art. 4(3) (1991) (conditioning immunity

Foreign nations overwhelmingly respect those limitations. The United Kingdom, for example, permits execution against sovereign property only if it is "in use or intended for use for commercial purposes." State Immunity Act 1978, c. 33, § 13(4); see *SerVaas Inc.* v. *Rafidian Bank*, [2012] UKSC 40, ¶¶ 23-28 (construing provision with reference to FSIA § 1610(a)). The statutes of other nations are similar.[10] And courts abroad regularly follow that rule even absent statutory guidance.[11]

The International Court of Justice recently held that customary international law prohibits execution against a sovereign's non-commercial assets. See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)*, 2012 I.C.J. Rep. 99 (Feb. 3). In that case, Greek plaintiffs obtained judgments against Germany for Nazi atrocities committed during World War II; they

---

on whether property is "intended for use for commercial purposes"); International Law Association, *Draft Convention on State Immunity*, 22 I.L.M. 287, 291 (1983) (similar).

[10] See, *e.g.*, Foreign States Immunities Act 1985, No. 196, §§ 30, 32 (Australia); State Immunity Ordinance, No. 6 of 1981, § 14(2)(b) (Pakistan); State Immunity Act, ch. 313, § 15(2)-(4) (Singapore); Foreign States Immunities Act 87 of 1981, § 14 (South Africa); Act on Civil Jurisdiction over Foreign States, Law No. 24 of 2009, arts. 17-18 (Japan), translated in 53 Japanese Y.B. Int'l L. 830, 835 (2010).

[11] See, *e.g.*, *Société Sonatrach* v. *Migeon*, Cour de Cassation, 1e civ., Oct. 1, 1985 (France), translated in 77 I.L.R. 525, 527 (1988) (sovereign assets immune from seizure unless "allocated for an economic or commercial activity"); *Abbott* v. *Republic of South Africa*, No. 107/92, S.T.C., July 1, 1992 (Spain), translated in 113 I.L.R. 411, 423, 425-426 (1999); *Condor & Filvem* v. *Minister of Justice*, No. 329, Corte Cost., July 15, 1992 (Italy), translated in 101 I.L.R. 394, 402-403 (1996); *Iraq* v. *Dumez*, Brussels Civ. Ct., Feb. 27, 1995 (Belgium), translated in 106 I.L.R. 284, 290 (1997); *Philippine Embassy Bank Account Case*, No. 2 BvM 1/76, Bundesverfassungsgericht, Dec. 13, 1977 (Germany), translated in 65 I.L.R. 146, 164 (1984).

then restrained property in Italy that Germany owned and used as "a cultural centre intended to promote cultural exchanges." *Id.* ¶¶30-35, 119. The ICJ held that the restraints violated international law. *Id.* ¶¶113-120. Absent consent or earmarking to satisfy the claim, the ICJ ruled, "any measure of constraint may be taken against property belonging to a foreign State [only if] the property in question [is] in use for an activity not pursuing government non-commercial purposes." *Id.* ¶118.

This Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). That canon has special force here given Congress's repeated recognition of international law principles. See *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989) ("[Courts] usually read the exception narrowly in order to preserve the primary operation of the provision."). Construing §1610(g) to be a blanket exception that eliminates immunity for sovereign property of whatever sort would put the provision at odds with customary international law. The statute can and should be construed to avoid that result.

C. Congress's Policy Against Terrorism Cannot Justify Disregarding §1610(g)'s Limitations

Petitioners urge this Court to disregard all of those principles in service of Congress's purported policy of "enabl[ing] terrorism victims to enforce their terrorism judgments to the fullest extent." Pet. Br. 56. But "no legislation pursues its purposes at all costs," and it "frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United*

States, 480 U.S. 522, 525-526 (1987) (per curiam); see also *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 461 (2012) (refusing to expand statute where "Congress has seen fit to proceed in more modest steps").

Congress did enact §1610(g) to expand remedies for terrorism plaintiffs. But it achieved that goal by eliminating *Bancec*'s presumption of separate status. That change by itself significantly expanded the assets available. There is simply no evidence—in the statute's text, structure, or history—that Congress went further and eliminated immunity for virtually all sovereign property.[12]

This case demonstrates how extreme that interpretation would be. The case involves ancient Persian artifacts—from the cradle of civilization—that "contain[] some of the oldest writings in the world." Pet. App. 4a-5a. Iran loaned those artifacts to the University of Chicago for academic study almost a century ago. *Ibid.* The unprecedented seizure of that cultural patrimony to pay off a default judgment offends even the most parsimonious views of sovereign dignity.

Cultural artifacts are the antithesis of commercial property. The U.N. Convention specifically provides that "property forming part of the cultural heritage of the State" or "property forming part of an exhibition of objects of scientific, cultural or historical interest" may not be deemed commercial property subject to execution, unless placed or intended to be placed on sale. U.N. Convention on Jurisdictional Immunities of States and Their

---

[12] Nothing in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016), speaks to that question. Section 1610(g) was not at issue in that case, and the parties did not brief the question presented here. This Court's observations in a footnote about §1610(g) "expanding the availability of assets for postjudgment execution" cannot reasonably be read to resolve the issue here. *Id.* at 1318 n.2.

Property, G.A. Res. 59/38, art. 21.1(d), (e). The ICJ proscribed restraint of a "cultural centre" even for claims arising from Nazi war crimes. *Jurisdictional Immunities of the State*, 2012 I.C.J. Rep. 99, ¶¶52, 119; see also *Kingdom of Spain* v. *Company X SA*, Tribunal Fédérale, Apr. 30, 1986 (Switzerland), translated in 82 I.L.R. 38, 43-45 (1990) (annulling attachment of "educational and cultural centre"); Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* 78 (2012).[13]

If the United States loaned a copy of the Declaration of Independence for study or display at the Louvre, it would certainly expect that the document would not be seized to pay off some plaintiff's default judgment. The same respect should be accorded to the cultural heritage of other nations here.

The absurdities of petitioners' construction would not end there. Absent a commercial activity limitation, terrorism plaintiffs could attach property that is critical to sovereign functions, creating serious international friction. See, *e.g.*, *Colella* v. *Republic of Argentina*, No. C 07-80084, 2007 WL 1545204, at *1, *6 (N.D. Cal. May 29, 2007) (rejecting attempt to seize "Tango Zero One"—Argentina's equivalent of Air Force One—because "transport[ing] the president of Argentina" is not a "commercial activity").[14]

---

[13] United States law likewise provides special protections to cultural property. See Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016) (codified at 28 U.S.C. § 1605(h)); Immunity from Seizure Act, Pub. L. No. 89-259, 79 Stat. 985 (1965) (codified at 22 U.S.C. § 2459).

[14] Petitioners claim that diplomatic and consular property would remain immune because § 1610(g) would not trump the Vienna Convention. See Pet. Br. 17-18; 28 U.S.C. § 1609 (immunity rules "[s]ubject to existing international agreements to which the United States is a

Nor would those tensions necessarily be limited to property within our borders. Unlike the commercial activity exceptions in § 1610(a) and (b), § 1610(g) contains no express limitation to "property in the United States." 28 U.S.C. § 1610(a), (b). If § 1610(g) were a freestanding immunity exception, plaintiffs might rely on that omission to try to seize even assets located abroad. Cf. *Koehler* v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 536 (2009) (approving turnover order directed to foreign assets). Such efforts can create serious tensions. If Congress had intended § 1610(g) to be a freestanding immunity exception, it would have addressed territorial limits, as it did elsewhere. That Congress did not do so speaks volumes.[15]

D. Petitioners' Interpretation Threatens Important Foreign Policy Interests

Petitioners' interpretation threatens serious consequences for the Executive Branch's ability to manage foreign relations and protect U.S. interests. The Executive Branch has warned that "enlarging the category of property available for * * * execution in the United States invites similar treatment by other countries where our assets may be located." *Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Courts & Administrative Practice of the S. Comm. on the Judiciary*, 103d Cong. 10 (June 21, 1994) (Deputy Assistant Attorney General Stuart Schiffer). "The breadth of our

---

party"). But the extreme consequences of their construction are not absolved simply because they manage to avoid some *even more* extreme results.

[15] Departing from the legal issues before the Court, petitioners point to certain comments by former trial counsel that they construe as attempting to justify terrorism. Pet. Br. 55. Whatever those statements meant, they were not authorized by Iran. They are not relevant. And no party before this Court is making any such argument.

government's involvement in litigation in foreign courts and the vast amounts of U.S. government property located abroad give us greater risk of exposure than any other country in the world." *Ibid.*

It is thus no surprise that the Executive Branch has repeatedly rejected petitioners' construction of § 1610(g). The United States has filed briefs to that effect in at least three cases in addition to this one. See U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442, Dkt. 82 at 1-2 (9th Cir. filed Oct. 23, 2015) ("[S]ection 1610(g) is not a freestanding exception to foreign sovereign immunity; a plaintiff seeking execution must * * * proceed under one or more of the exceptions to immunity separately set out in section 1610."); U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182, Dkt. 24 at 28-29 (9th Cir. filed July 3, 2014) (similar); U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582, Dkt. 51 at 17-21 (2d Cir. filed Nov. 4, 2011) (similar).

This Court "pa[ys] special attention" to the Executive Branch's views on sovereign immunity. *Helmerich*, 137 S. Ct. at 1320; see also *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (views "of considerable interest to the Court"). The Court has paid particularly close attention where the Executive has warned of international friction and repercussions. See *Helmerich*, 137 S. Ct. at 1322 (citing Executive Branch's warnings and noting that "[a]t any given time the Department of Justice's Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world").

Petitioners seek a massive departure from accepted standards so they can execute against sovereign property with virtually no limitations—and no oversight by the Executive. If plaintiffs can seize ancient Persian artifacts

from a museum to pay off a default judgment, little is safe. That is not an example that U.S. law should or does set.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

GERALD P. MEYER
MICHELLE J. PARTHUM
MOLOLAMKEN LLP
300 North LaSalle St.
Chicago, Illinois 60654
(312) 450-6700

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
WILLIAM J. COOPER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondent Islamic Republic of Iran

OCTOBER 2017

APPENDIX

STATUTORY APPENDIX

Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 338, provides as follows:

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY.—

(1) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL.—

"(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD.—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or

was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action,

damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS.—

"(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.—

"(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending ac-

tion pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS.—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS.—

(1) GENERAL EXCEPTION.—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS.—

"(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT.—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES.—

(1) IN GENERAL.—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS.—

(A) IN GENERAL.—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Fi-

nancing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of

title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ.—

(1) APPLICABILITY.—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY.—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.